IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 44 OF 2006

Shri Raghuvir Dessai,
S/o. Shaba Dessai,
R/o Maddemil, Fatorpa,
Cuncolim.
(Presently in custody
at Central Jail, Aguada,
Goa). ... Appellant

versus

State
(Through P.P.) ... Respondent

Mr. Arun Bras De Sa, Advocate for the Appellant.

Ms. Winnie Coutinho, Public Prosecutor for the State/Respondent.

CORAM : N. A. BRITTO, J.

DATE : 22ND & 28TH SEPTEMBER,2006.

ORAL JUDGMENT

This appeal is by the accused who has been convicted and sentenced under Sections 342 and 376(2)(f), I.P.C. by the learned Assistant Sessions Judge, Margao.

2. The accused was a watchman of a Government School known as Sahakari Pratnik Vidhlaya situated at Molcornem within the jurisdiction of Quepem Police Station of which Shaikh Ismail/PW7 was the Headmaster. The said school was being run in two sessions. The secondary section was run in the morning session, whilst the primary section was run in the evening session of which Channama Patel/PW4 and Chitra Gaonkar/PW13 were the primary teachers. The victim/PW11, Ramesh/PW12, Swapnil Kerkar/PW9 and Sonali Gaonkar/PW10 were the students of the said primary section. Yeshwant Bhile/PW14 was the Peon of the said school.

3. The accused was charged and tried with an allegation that on 6-8-2003 at about 13.30 hours the accused wrongfully confined the victim/PW11, who at the relevant time was 8 years old and studying in the third standard, and committed rape upon her. The case of the accused was one of denial simpliciter.

4. From the facts stated by the victim/PW11 and her mother Smt. Ujwala Parmar/PW1 it transpires that after the school assembly was over all the children of the primary section

were made to sit in one class and that is because Channama Patel/PW4 was having lunch in one of the classrooms and after the students came back to the respective classrooms i.e. the students of class I and II in one room and class III and IV in the other room, Swapnil Kerkar/PW9 told the victim/PW11 that the accused had called her and Sonali Gaonkar/PW10 to sweep. The victim/PW11 and Sonali/PW10 did not heed the said request and thereafter the accused came near the window of the classroom where the victim/PW11 was studying and told the teacher Chitra/PW13 to send the victim/PW11 and Sonali/PW10 for sweeping. Chitra/PW13 is stated to have told the accused to take Ramesh but the accused told the said teacher to send the victim/PW11 and the said Sonali/PW10 and accordingly sent both of them and upon going near the accused, the accused gave one broom to the victim/PW11 and another broom to Sonali/PW10 and first the victim/PW11 was told to sweep inside the Office and told Sonali/PW10 to sweep outside the Office but later, their roles were reversed. As stated by the victim/PW11 once the victim went inside the Office, the accused closed the door of the Office from inside and when she attempted to come out of the Office the accused prevented her from going outside

and then caught her tightly and she shouted for help and did not leave her and thereafter the accused kept her on a chair and removed her panty and then removed his half pant and thereafter the accused sexually assaulted her and raped her and blood started coming from her private part and thereafter the accused opened the door, and, she and Sonali/PW10 went to their class and after the school was over at about 6 p.m. her mother came to take her home and she went home with her mother walking and after reaching home when her grandmother was removing her clothes the grandmother noticed blood stains on her panty and questioned her about the said blood stains and at that time her mother was also there and thereafter her mother took her on the bed and examined her and asked her about the blood stains and she narrated the incident to her mother and thereafter her mother and her grandmother came to the school and they found the watchman near a gadda/stall situated near the said school and when her mother asked the accused about the incident, the accused denied everything and then the grandmother returned home while she and her mother went to the teacher's house namely Chitra/PW13 who stays near the school and her mother confirmed from the teacher that she

(PW11) and Sonali/PW10 were called by the watchman whereupon her mother narrated the entire incident to Chitra/PW13 and thereafter her mother and father went to the Police Station along with her. At the Police Station the complaint of the mother Smt.Ujwala Parmar was recorded by PSI Albuquerque/PW16 at 21.00 hours and the accused arrested at 22.30 hours. The victim/PW11 and the accused were sent for medical examination. The victim/PW11 was examined by Dr. Sapeco/PW5 and Dr.(Mrs.) Cardozo/PW6 who submitted a joint report. They found that the victim/PW11 had a fresh tear at 5 o'clock position of hymen with oozing of serum and little fluid blood. The injury was edematous and bled to the touch and they opined that there was evidence of recent forcible sexual intercourse. The accused was also examined by Dr. Sapeco/PW5 and Dr. Lad/PW8 who opined that the accused had a fresh laceration at the frenulum which was edematous, tender and bled on touch and opined that there was evidence of the accused having had forcible sexual intercourse.

5. The scene of offence panchanama was conducted on 7-8-2003 at about 14.00 hours in the presence of Shankar

Malik/PW3 and when photographs were taken and which have been produced at Exh.22. The banian and the short pant worn by the accused were attached at the time of his arrest in the presence of Sandip Malkankar/PW2 and the clothes of the victim/PW11 namely her uniform and the panty/under garment were attached on 7-8-2003 also in the presence of Sandip/PW2. The said clothes were subsequently sent for examination to the Central Forensic Science Laboratory at Hyderabad(CFSL) but neither blood nor semen was detected on the same. As stated by Smt. Ujwala Parmar/PW1 the underwear of the victim/PW11 (Exh.2(B)) was already washed by the grandmother of the victim/PW11.

6. As stated by Dr. Sapeco/PW5, the accused and the victim/PW11 were sent to him on 16-9-2003 for DNA test and the evidence of Dr. Sapeco/PW5 when read with the evidence of the Senior Scientific Officer Shri S. Sathian/PW15 shows that the semen(Exh.C) collected by Dr. Sapeco matched with the blood(Exh.G) with that of the accused. Sathian/PW15 opined that the accused(source of Exh.G) was the contributor of the semen(Exh.C) found on the vaginal swab.

7. The prosecution had examined 18 witnesses in all. The learned Assistant Sessions Judge after considering the evidence led by the prosecution came to the conclusion that only one witness had turned hostile namely the said Chitra/PW13 who according to the prosecution was responsible for sending the victim girl/PW11 along with Sonali/PW10 for sweeping which could not be done as students were not expected to sweep the school office and the reason of her turning hostile was not very far to seek because she herself admitted in her cross-examination that the Government had suspended her from the school after the said incident. The learned Assistant Sessions Judge observed that it was not material as to whether the accused was residing in the school premises or not, and this inspite of the fact there is overwhelming evidence that the accused was residing in the school itself, once it was proved beyond doubt that he was working as a watchman of the said school at the relevant time. After analyzing the entire evidence, the learned Assistant Sessions Judge came to the conclusion that the case of the prosecution was proved beyond doubt against the accused and

therefore proceeded to convict and sentence the accused, as aforesaid.

8. Before adverting to the submissions made on behalf of the accused by the learned Counsel Mr. Bras De Sa, it is necessary to revert to the evidence of the victim/PW11 wherein she stated that the watchman kept her on the chair and he removed her panty and the watchman also removed his half pant and thereafter he sexually assaulted her and raped her and blood started coming out from her private part. On the assumption that the actual act of rape was committed by the accused by the latter standing on the ground and the victim having made to stand on the chair, several questions were put to Dr. Sapeco/PW5 and Dr. Cardozo/PW6. It is not necessary to refer to that part of the cross-examination since nothing can come out of said hypothetical questions. Unless the pelvic regions of both were at the same level, no intercourse would have been possible but that is quite another matter. While the cross-examination of the victim/PW11 was in progress the victim again stated that she was made to stand on the plastic chair, and a plastic chair of 42 cms. in height was shown to the victim and learned Counsel of

the accused wanted to take measurements of the height of the victim and the accused, which was objected to, by the prosecution and therefore the learned trial Court disallowed any such measurements being taken. A question was also put to PSI Albuquerque/PW16 who stated that the accused then made her to stand on the chair and committed rape on her. Mr. Bras De Sa, the learned Counsel on behalf of the accused has submitted that if the victim/PW11 was standing on a plastic chair and the accused was standing on the ground, their respective pelvic regions could not have been on the same line and in that position it would not have been possible for the accused to have intercourse with the victim/PW11. The learned Counsel Mr. Bras De Sa further submits that the learned trial Court disallowed a vital question and therefore this would be a fit case for remand or in the alternative to recall the victim/PW11 for cross-examination to find out whether it was at all possible for the accused to have had intercourse with the victim/PW11, the former standing on the ground and the latter standing on the chair. The learned Counsel further submits that the chair itself was not attached by the Investigating Officer. The learned Counsel Mr. Bras De Sa has further submitted that the evidence

of Headmaster Shaikh Ismail/PW7 shows that the timings of the accused were from 6.30 p.m. to 7.30 a.m. and therefore the incident which allegedly took place in the afternoon session appears to be of doubtful character.

9. On the other hand, the learned Public Prosecutor Ms. Winnie Coutinho has submitted that it is nobody's case that the accused had intercourse with the victim/PW11 whilst the accused was in standing position from the ground whilst the victim was in standing position on the chair. She has further submitted that the statement of PSI Albuquerque/PW16 was not a statement made by an eye witness but was based on what the victim is stated to have narrated to him in her statement. The learned Public Prosecutor further submits that the victim is a girl of tender years and there has been no reason assigned as to why she should implicate the accused, falsely. Moreover, the learned Public Prosecutor submits that the version of the victim has been sufficiently corroborated by Swapnil/PW9 and Sonali/PW10 and the evidence of Sathian/PW15 and the reports submitted by him sufficiently connects the accused with the crime committed by him. In turn, Mr. Bras De Sa, the learned

Counsel for the accused has submitted that the report of Sathian/PW15 could have connected the accused with the victim only in the event the prosecution had shown whether it was possible to commit sexual intercourse by the accused upon the victim in the manner alleged by the victim/PW11.

DATE : 28th September, 2006.

10. The parameters of appreciating evidence in rape cases is well settled. In the case of **Bharwada Bhoginbhai Hirjibhai** v. **State of Gujarat**(AIR 1983 SC 753) the Supreme Court has stated that the evidence of a victim of sexual assault stands on par with an injured witness. Just as a witness who has sustained an injury is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of an offence is entitled to great weight, absence of corroboration notwithstanding. The Supreme Court has stated that corroboration is not the sine qua non for a conviction in a rape case. In the case of **State of Punjab** v. **Gurmit Singh and others**((1996) 2 SCC 384) it is stated that a conviction can be founded on the testimony of the prosecutrix alone unless there

are compelling reasons for seeking corrobortion. In the case of **State of Rajasthan** v. **N. K. The Accused** ((2000) 5 SCC 30) the Supreme Court has stated that the testimony of the prosecutrix should be appreciated on the basis of probabilities like the testimony of any other witness and conviction can be based solely on such testimony but if the Court finds it difficult to accept her testimony, it must seek assurance to her testimony, which may be short of corroboration from her evidence. The same view has been reiterated in **Aman Kumar and another** v. **State of Haryana**(2004 AIR SCW 827) by observing that the evidence of a rape victim needs no corroboration as she is standing on higher pedestal than an injured witness and if a testimony is doubtful the Court may search for any assurance short of corroboration and again in **State of Tamil Nadu** v. **Ravi @ Nehru**(2006 AIR SCW 3444). It is a well accepted principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence. As observed by the Supreme Court in the case of **State of Tamil Nadu** v. **Ravi @ Nehru**(supra)the woman or a girl subjected to sexual assault is not an accomplice to the crime but

is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion treating her as if she were an accomplice. As rightly observed by the learned trial Court in case of doubt to the testimony of a victim of sexual assault the Court can if required search for assurance, short of corroboration. In the case at hand, there is overwhelming corroboration to the evidence of the victim/PW11.

11. All that the victim/PW11 stated in her evidence was that the watchman kept her on the chair and removed her panty and the watchman also removed his half pant and thereafter he sexually assaulted her and raped her and blood started coming from her private part. The victim/PW11 did not state that the actual act was committed by the accused standing on the ground and she standing on the chair and in fact there has been no further cross-examination as to how the actual act was committed by the accused. It is quite possible that in case she was asked further details, she might have explained the same, or may be not. However such details, from a girl of 8 years of age, in my view, are of no significance in the light of other evidence

on record. On that count her evidence cannot be rejected as improbable. No case is made out either for remand or for further cross-examination of the victim/PW11 whose evidence otherwise stands overwhelmingly corroborated not only by medical evidence but other evidence as well. In other words, the evidence of medical officers and Shri Sathian/PW15 clearly shows that there was sufficient penetration to constitute the offence of rape and therefore in what position the act of rape was committed pales into insignificance.

12. Swapnil/PW9 has stated that he met the watchman, the accused when he went to bring water for his teacher Channama/PW4 and who told him to come with the victim/PW11 and Sonali/PW10 for sweeping and who did not acceed to his request as a result of which the accused had to come to the window and tell the teacher Chitra/PW13 to send the victim and Sonali/PW10 for sweeping. The version of Swapnil/PW9 has been sufficiently corroborated by Sonali/PW10 and the latter also corroborates the evidence of the victim/PW11 when she stated that the accused gave in their hands one broom each and told them to sweep the Office room. Sonali/PW10 also stated

that the accused told her to sweep outside the Office whilst the victim continued sweeping inside the Office when the accused closed the door from inside and the victim came out after about half an hour, after the accused opened the door from inside, and both of them went to the classrooms. The mother of the victim namely Ujwala/PW1 has further corroborated the version given by the victim/PW11 when she stated that her daughter had informed that the accused had told her to clean the floor in the Office by sending Sonali/PW10 to clean outside the Office and how the accused had, upon entering the Office latched the room from inside and that the accused had removed her underwear and had also removed his clothes and had committed rape on her. The evidence of the said witnesses is sufficiently corroborated also by the teacher Channama/PW4 that at 8 a.m. on the next day she came to know through Chitra/PW13 that the accused had committed rape on the victim in the school on the previous day and this is obvious because the mother and the victim had met the said Chitra/PW13 after they returned from their house and confirmed from her about the sending of the victim for sweeping, upon being called by the accused. Channama/PW4 also corroborated the version of Swapnil/PW9

stating that she had told him to bring water for her to drink. She also corroborates the version of all the three students including the victim when she stated that she had seen Sonali/PW10 sweeping the corridor of the school. It appears that the sweeper Saraswati had not turned up on that day and the accused took an opportunity to get the Office swept by the said two students namely the victim/PW11 and Sonali/PW10. Channama/PW4 has confirmed that the accused was residing in the school. If at all Chitra/PW13 the other teacher did not support the case of the prosecution it is obviously because she was suspended from the school, as rightly noted by the learned Assistant Sessions Judge. Ramesh/PW12 further confirms that Sonali/PW10 and the victim/PW11 were sent for sweeping. The most important corroboration has come from medical evidence as already noted. Dr. Sapeco/PW5 who examined the accused on 7-8-2003 at 01.10 a.m. and Dr. Lad/PW8 who examined the accused have confirmed that the accused was having a laceration of 1/4 x 1/4 cms. at the frenulum of the penis on the basis of which they have concluded that the accused had recent forcible sexual intercourse. When the accused was questioned about the said injury in his statement recorded under Section 313 of the Code,

the accused stated that he did not have such an injury but later added that he had a girlfriend with whom he had sexual intercourse on 4-8-2003. It was certainly not the case of the accused that he had sexual intercourse with his girlfriend for the first time on 4-8-2003 and apart from the said bare statement the accused did not produce any other evidence to explain the said injury which according to Dr. Sapeco/PW5 was fresh at time of examination. In case the said injury was two days old, Dr. Sapeco would not have opined that it was fresh and bled on touch at the time when he had seen the same. The explanation of the accused is therefore wholly unacceptable. The evidence of Dr. Sapeco/PW5 and Dr. Cardozo/PW6 prove that the victim/PW11 had a fresh tear at 5 O'clock position of the hymen with oozing of serum and fluid blood and which was edematous and bled on touch which is more than sufficient to corroborate the version of the victim/PW11. The clinching evidence has come from the Senior Scientific Officer Shri Sathian/PW15 who carried out the DNA test on the basis of the material forwarded to him and which was collected by Dr. Sapeco/PW5. He has confirmed that the accused is the contributor of the semen which was collected by Dr. Sapeco in the form of vaginal swab. DNA

(Deoxyribonucleic acid) is found specially in cell nuclei which are the foundation of heridity. DNA is the genetic blue print for life and is virtually contained in every cell. No two persons, except identical twins have ever had identical DNA. DNA testing can make a virtually positive identification when the two samples match. It exonerates the innocent and helps to convict the guilty. (See page 249 of Jhala and Raju's Medical Jurisprudence Sixth Edition). The DNA testing hits the nail on the head of the accused and is the last and clinching piece of evidence which shows that it is the accused and the accused alone who committed the rape on the victim/PW11. The accused did not even remotely suggest as to why the students referred to herein above and particularly the victim/PW11 should have falsely implicated him. The conviction of the accused therefore could not be faulted in the light of overwhelming evidence produced by the prosecution and referred to herein above.

13. A last submission has been made by Mr. Bras De Sa submitting that the accused could not have been tried by the learned Assistant Sessions Judge. This submission was not made either before the learned Assistant Sessions Judge or the learned

Sessions Judge. This matter is concluded with the unreported judgment of this Court dated 6-12-2005 in Criminal Revision Application No.30/2005 wherein this Court held: "In my view, the trial of cases is governed by Section 26 of the Code r/w Schedule I and imposition of the sentences by Section 28 of the Code and Section 26 of the Code is not dependent on Section 28 of the Code. In other words, the power or jurisdiction to try an offence is not dependent on the power to impose sentences. The contention that the trial of the accused was without jurisdiction, therefore, deserves to be rejected". There is no dispute as regards the sentencing powers of an Assistant Sessions Judge that an Assistant Sessions Judge can impose punishment upto 10 years. This is a clear case of the fence eating the crop and therefore the accused cannot complain that the sentence is severe. There are no mitigating circumstances at all in favour of the accused for reduction of sentence. Deterrence remains as one of the objects behind the imposition of punishment. The injuries inflicted on the victim/PW11 must have certainly healed but nevertheless the scars left by the said injuries, which are physical, emotional and psychological may never heal and she may have to live with

them for a long time to come. Courts are expected to be stern where they should be. A sentence should reflect the collective conscience of the Society who abhors crimes such as these.

14. Before concluding, it must be stated that the accused had filed an appeal against the Judgment dated 13-6-2005 to the Court of Sessions and the learned Sessions Judge, Margao was pleased to dismiss the same. The accused preferred a revision to this Court against the Order of the learned Sessions Judge dated 22-2-2006, and by Order of this Court dated 12-7-2006, the said Order of the learned Sessions Judge was set aside for want of jurisdiction and the revision filed by the accused was treated as an appeal.

15. There is no merit in this appeal and hence the same is hereby dismissed.

N. A. BRITTO, J.

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